August 20, 1949

Mr. John P. Clark
City Attorney
Winslow, Arizona

Dear Mr. Clark:

We have your letter of June 27, 1949, wherein you ask:

> "Will you kindly advise me whether or not a City Engineer, appointed by the Mayor and Common Council, and who is serving in that capacity, is eligible to also accept appointment as a Highway Commissioner if the Governor should see fit to so appoint him?"

We must first decide whether there is a general prohibition against holding a multiplicity of offices in either the Constitution or laws of this State. Such prohibition does appear in the Constitution of Arizona concerning members of the legislature. See Article 4, Part 2, Sections 4 and 5. Our search indicates that there is no such prohibition in the Constitution as to public officers generally, nor did such a general provision exist in our statutes prior to 1949.

Chapter 68, Laws of 1949 (19th Legislature, Senate Bill 25) amended Article 1, Chapter 12, ACA 1939 by adding Section 12-110, which reads in part as follows:

> "12-110. Incumbent filing for election. (a) No person shall hold more than one office at the same time, * * * "

> (b) Any person violating this section shall be guilty of misfeasance in office, and the office held by such person shall be declared vacant."

The major portion of this new section is concerned with declaring that an incumbent of an elective office cannot be eligible for nomination or election to any office other than the office being so held, nor shall any nomination papers of such a person be accepted for filing. The language of the section which prohibits the holding of more than one "office" at the same time is not limited to elective offices, nor can we presume that it was so intended. Article 1 of Chapter 12, ACA 1939, to which Section 12-110 was appended, concerns the qualifications, terms and appointments of public officers, and Section 12-101, in so far as it is pertinent, provides:

> "Definitions. - By the word 'office', 'board', or 'commission', used in law, is meant any office, board or commission of the state, or any political subdivision thereof, the salary or compensation of the incumbent or members of which is paid out of a fund raised by taxation, or by public revenue;" (Emphasis supplied)

The definitions in this last-quoted section are certainly applicable to all of the sections in the article, and we must assume that the legislature in enacting the new section had knowledge of the existence and contents of the other sections touching upon the same subject matter. Sutherland Statutory Construction, 3d Ed., Volume 2, Section 5201; see also: Home Owners' Loan Corp. v. City of Phoenix, 51 Ariz. 455, 77 P. 2d 818. When a legislature defines the language it uses, its definition is binding upon the courts. Sutherland Statutory Construction, Volume 2, Section 4814.

We are assuming that both of the offices in question, State Highway Commissioner and City Engineer, are public "offices" within the statutory provisions herein involved. Both appear to fall within the definitions in the Arizona cases of Industrial Commission v. Arizona State Highway Commission, 61 Ariz. 59, 145 P. 2d 846, and Stapleton v. Frohmiller, 53 Ariz. 11, 85 P. 2d 49, 52. See, as to town engineer, Sections 16-208, 16-209 and 16-210 ACA 1939; and as to city engineer as officer, Sections 16-220 and 16-221 ACA 1939; as to highway commissioner, see Sections 59-101 ACA 1939, et seq., and Section 59-103, setting forth the qualifications for said office.

Construing Section 12-110, supra, and 12-201, supra, together, the prohibition in the former against holding more than one office at the same time applies not only to State offices, but reaches down to and embraces offices of "any political subdivision" of the State. Is, then, an office with the City of Winslow an office with a "political subdivision" of the State within the meaning of the above sections. There is no question but what the salary or compensation of the two offices herein involved arises from funds raised by taxation or from public revenue.

There is no specification within Article 1, Chapter 12, supra, of what is meant by "any political subdivision thereof". Nor have we found elsewhere in our statutes or in our Constitution an adequate and exhaustive enumeration of those political units which are in this State "political subdivision". The language of Section 12-102 ACA 1939 setting forth the general qualifications of public officers, by its terms concerns offices in public institutions of the State and the several counties thereof, and Section 12-103 concerns State, county or precinct offices, but the language of Sections 12-110 and 12-101, supra, read together appears broader in scope. Had the legislature intended to limit the application of the prohibition to offices of those particular subdivisions it would have been quite simple to do so, and the fact that it was not done is somewhat indicative that no such limitation was intended. In

Russell v. Glascow, 63 Ariz. 310, 162 P. 2d 129, our Court invoked a portion of Section 12-101, supra, in determining a case concerning police officers employed by the City of Globe, a municipal corporation.

The phrase "political subdivisions" is scattered through both the Constitution and statutes of this State. Article 9, Section 7, Constitution of Arizona concerns the loaning of public credit and reads in part:

> "Neither the state, nor any county, city, town municipality, or other subdivision of the state shall ever give or loan its credit in aid of, * * *." (Emphasis supplied)

Article 7, Section 13, ibid., deals with voters on bond issues and provides:

> "Questions upon bond issues or special assessment shall be submitted to the vote of real property taxpayers, who shall also in all respects be qualified electors of this state, and of the political subdivision thereof affected by such question." (Emphasis supplied)

The Supreme Court of this State has, on many occasions, applied this provision to cities within the State. See Allison v. City of Phoenix, 44 Ariz. 66, 33 P. 2d 927, 93 ALR 354, and other cases cited in notes to the provision. In City of Globe v. Willis, 16 Ariz. 378, 146 P. 544, the Court held that bonds issued by a municipality (City of Globe) as evidence of its obligation are included within the terms of this constitutional provision, necessarily deciding said municipality to be a "political subdivision" of the State within its meaning. Section 10-601 ACA 1939 concerns increasing indebtedness of "political subdivisions" and in so far as pertinent reads:

> "The aggregate indebtedness of any county, school district, city, town, or like municipal corporation may be increased above four (4) per centum of the value of the taxable property in such political subdivision in the manner herein provided; * * *" (Emphasis supplied)

See use of "political subdivisions" in the several subsequent sections. There are undoubtedly other similar uses of the phrase elsewhere in our laws. Although such use of terms may not be deemed conclusive, they are some indication of the general meaning and coverage given in this State to determine "political subdivisions". In Maricopa County M.W.C. Dist. No. 1 v. LaPrade, 45 Ariz. 61, 40 P. 2d 94, the Arizona Supreme Court shed some light on the meaning of the phrase. One of the prime questions involved was: What is the nature of an irrigation district under our laws? In the course of his opinion, Chief Justice Lockwood said:

> " * * * But the article referred to shows on its face that it concerns itself only with municipal corporations of the type of cities and towns, political subdivisions of the state in the full sense of the term, and not with organizations of the type of the district." (Emphasis supplied)

And further:

> " * * * But it is also held that legislative power of a purely local nature may be delegated to political subdivisions created for the purpose of local self-government." (Emphasis supplied)

This language would seem to refer to cities and towns. And again:

> "We think the true rule and the reasons therefor are well-stated in Day v. Buckeye Water etc. Dist., supra, (28 Ariz. 446, 237 Pac. 336) as follows:
>
> 'Counties, cities, towns, and municipalities all belong to a class of subdivisions of the state primarily established for what are commonly called political and governmental, as aside from business purposes.
> * * *"

All of the foregoing goes to show simply that if the term "political subdivision" in Section 12-101, supra, as applicable to 12-110, supra, was used by the legislature in its broadest "Arizona usage", the prohibition in the latter section extends to offices in cities and towns and would prohibit one from holding at the same time both a State office and one with a city or town. Whether this was indeed the actual legislative intent, such intent being the "polar star" of statutory construction, may be subject to some conjecture. It could be strongly argued that the prohibition was intended to cover only the holding of more than one State or county office, but was never aimed at offices with numicipal corporations. Of course, if such had been the intent it would seem that language appropriate for the purpose could have been easily chosen. It would also seem that the term "political subdivision" cannot be completely and satisfactorily defined in the abstract, but rather its definition is dependent upon the use of the phrase in context, the purpose of the specific statute involved, and the various other considerations.

McQuillin's Municipal Corporations, 3d Ed., Volume 1, Section 2.08 says:

> "A municipal corporation is generally regarded by the courts as a subordinate branch of the government of the state, and therefore

> Municipal administration as an instrumentality of state administration. It exercises delegated powers of government, and charters are granted for the better government of the particular areas or districts. It is a political division of the state and generally a creature of the legislature. It is variously described as an arm of the state, a miniature state, an instrumentality of the state, a mere creature of the state, an agent of the state, and the like.
>
> The purpose of municipal corporations is first to serve the local inhabitants in regulating and promoting community affairs, and second, to serve the inhabitants of the state residing in the locality in common state matters as an agency of the state. Municipal corporations are in an important sense agencies of the state, and in them repose a certain part of the political power of the state, but their chief purpose is to regulate and administer the local and internal affairs of the particular community. The purpose of municipal corporations has been said to be 'to carry into effect some power which the state itself may, but cannot conveniently, exercise'." (Emphasis supplied)

At Section 2.31 the author states that a city "* * * has been held a 'political subdivision' of the state, as that term is used in the federal statute. * * *" See cases in notes to these sections. 37 Am. Jur., Municipal Corporations, Section 4, states:

> "Municipal corporations are bodies politic and corporate, created not only as local units of local self-government, but as governmental agencies of the state. They are involuntary political or civil subdivisions of the state created as agents of the state to aid in the administration of government." (Emphasis supplied)

In 43 C.J., Municipal Corporations, Section 5, it is stated:

> " * * * In their public and governmental aspects municipal corporations are referred to as arms of the state government, auxiliaries of the state, * * * political subdividions of the state. * * * (Emphasis supplied)

The cases cited in support of these text statements are at odds as to whether cities and towns are true "political subdivisions" of the state. As we stated above, the divergence can be traced in a large measure to the particular usage of the term and purpose of the statutory or constitutional provision involved. See Commissioner of Internal Revenue v. Shanberg's Estate, 144 Fed. 2d 998. The California courts have held, as have the courts of some other states, that cities are distinct, individual entities and not connected political subdivisions of the state. In In re Northern Bank of New York, 85 Misc. Rep. 594, 148 NYS 70, the new York court said that unless a city is acting in a purely governmental capacity it is not a mere subdivision of the state. There are, on the other hand, many cases supporting the principle that a city is a "political subdivision" of the state. For only a few, see:

> Trenton v. New Jersey, 262 U.S. 182, 67 L. ed. 937; 43 Supreme Court Reports 534, 29 ALR 1471
>
> Penick v. Foster, (Ga.) 58 SE 773

Creekmore v. Public Belt Railroad Commission, (CCA 5) 134 Fed. 2d 576

None of the cases that we have examined can be said to be determinative of the situation before us - the intent of our own legislature would seem controlling if it can be ascertained. The final answer must rest with our courts, and they might well hold that the prohibition in Section 12-110, supra, against holding more than one office at the same time, applies here so as to prevent a city engineer from accepting an appointment to the State Highway Commission.

Over and above the statutes we have been discussing we find no direct prohibition in our laws against the holding of the two positions in question. The general common-law rule, applicable here so far as not inconsistent with our laws, is that a public officer cannot hold two incompatible offices at the same time. There is, however, no common-law inhibition against the holding by the same person of more than one compatible office. 43 Am. Jur., Public Officers, Section 59. Before two offices will be declared incompatible there must be an inconsistency in the functions of the two, and the incompatibility must be such as to render it improper from considerations of public policy for one person to retain both. Mechem on Public Officers, Section 70; 42 Am. Jur., Public Officers, Section 442. See annotations, 2 Ann. Cas. 380, LRA 1917A, page 216. See also, 46 C. J., Officers, Sections 46 et seq., wherein the test is termed: "conflict of interest". See Perkins v. Manning, 59 Ariz. 60, 122 P. 2d 857.

A survey of the general statutory duties in each of the offices of Highway Commissioner and City Engineer leads us to conclude that there is no inherent conflict or incompatibility between them, and that applying the common-law rule, and assuming no statutory provision to the contrary, a city engineer could properly accept a proffered appointment as a highway commissioner. It might be argued that were a city engineer to sit as a member of the commission he might be strongly inclined in his actions as a Commissioner to represent the best interests of the city by which he is employed, and that there would be, of necessity,

a conflict of offices contrary to public policy jeopardizing the interests of the whole public. Such a suggestion would, in our opinion, be more hypothetical than real. A similar objection could as well be raised to any person appointed to the commission, for each person has, to a greater or less extent certain natural or artificial prejudices, "leanings", and alliances which might tend to react upon his official actions, whether he be otherwise in public or private employ. We must assume the high nature of such a position of public trust would hold sway over one's personal feelings and allegiances.

The ultimate and conclusive answer to your question would seem to be for the determination of the courts, and they might well hold that Section 12-110, supra, forbids the holding by one person of the two positions.

Yours very truly,

FRED O. WILSON
Attorney General

RICHARD C. BRINEY
Assistant Attorney General

RCB:lh